Aldon Keith KENTNER, Appellant,

v.

SEABOARD COAST LINE RAILROAD COMPANY and The Seacoast Transportation Company, Appellees.

No. 72-296.

District Court of Appeal of Florida,

June 6, 1973.

Appeal from Circuit Court, Hillsborough County; Jas. D. Bruton, Jr., Judge.

William R. Hapner, Jr., of Rood & Hapner, Tampa, and Marvin E. Barkin of Trenam, Simmons, Kemker, Scharf & Barkin, Tampa, for appellant.

William A. Gillen of Fowler, White, Gillen, Humkey, Kinney & Boggs, Tampa, for appellees.

PER CURIAM.

One or two of the points raised on appeal at first gave us pause, but after having carefully considered those points and having meticulously reviewed the record herein we conclude that no reversible error has been made to appear. Accordingly, the judgment and sentence [sic] appealed from should be, and they are hereby, affirmed.

MANN, C. J., and LILES and McNULTY, JJ., concur.

A-2

Aldon Keith KENTNER, Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY and the Seacoast Transportation Company, Respondents.

No. 44038.

Supreme Court of Florida.

Oct. 16, 1973.

Rehearing Denied Dec. 12, 1973.

Certiorari denied. 278 So.2d 637.

CARLTON, C. J., and ROBERTS, BOYD and DEKLE, JJ., concur.

ERVIN, ADKINS and McCAIN, JJ., dissent.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

ALDON KEITH KENTNER,

Plaintiff,

vs.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, and THE SEACOAST TRANSPORTATION COMPANY, a foreign corporation,

Defendants and Third Party Plaintiffs,

vs.

W. J. SMALLEY, doing business as SMALLEY TRANSPORTATION COMPANY, SMALLEY INVESTMENTS, INC., a corporation, and ROYAL INDEMNITY COMPANY, a corporation,

Third Party Defendants.

Case No. 192187

Division C

SUMMARY FINAL JUDGMENT FOR DEFENDANTS

This cause came on to be heard, after due notice, upon the motion of the defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, for a summary judgment against the plaintiff, Aldon Keith Kentner, and, having considered the legal authorities cited by, and the arguments of, counsel for the respective parties, the Court finds:

a. The pleadings, depositions and admissions on file show that there is no genuine issue as to the material fact that, on or about October 30, 1970, and after the plaintiff's claim in this action accrued, the plaintiff released the defendants and all other persons, firms and corporations from it, by executing, acknowledging and delivering a written instrument entitled "RELEASE OF ALL CLAIMS" in connection with the settlement of another suit then pending in this Court, to wit, No. 179833, wherein Aldon Keith Kentner was plaintiff and W. J. Smalley, et al, were defendants.

b. The defendants are entitled to a judgment as a matter of law in connection with the Fifth Defense and Ninth Defense set forth in the Answer of Defendants, as amended, wherein the defendants have pleaded the said release as a bar to recovery in this action.

IT, THEREFORE, IS ADJUDGED as follows:

1. That the Defendants' Motion for Summary Judgment Against Plaintiff be and the same hereby is granted.

2. That the plaintiff, Aldon Keith Kentner, take nothing by this action and that the defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, go hence without day.

ORDERED at Tampa, Florida, this 28 day of February, 1972.

/s/ JAMES D. BRUTON, JR.
Circuit Judge

Copies furnished to:

William R. Hapner, Jr., Esq.
F. Ronald Fraley, Esq.
William A. Gillen, Esq.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CIVIL ACTION

ALDON KEITH KENTNER,

Plaintiff,

vs.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, and THE SEACOAST TRANSPORTATION COMPANY, a foreign corporation,

Defendants and Third Party Plaintiffs,

vs.

W. J. SMALLEY, doing business as SMALLEY TRANSPORTATION COMPANY, SMALLEY INVESTMENTS, INC., a corporation, and ROYAL INDEMNITY COMPANY, a corporation,

Third Party Defendants.

Case No. 192187

Division C

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE AFFIDAVIT AND STIPULATION CONCERNING STATEMENTS MADE DURING HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR REHEARING

This cause came on to be heard, after due notice, upon the motion of the defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, to strike the affidavit of William R. Hapner, Jr., dated March 6, 1972, and the stipulation concerning statements made during hearing on defendants' Motion for Summary Judgment

referred to in the plaintiff's Motion for Rehearing, and upon the plaintiff's Motion for Rehearing, and was argued by counsel for the plaintiff and defendants, and thereafter, the court being fully advised in the premises, it is

ORDERED and ADJUDGED as follows:

1. That the Defendants' Motion to Strike Affidavit and Stipulation Concerning Statements made During Hearing on Defendants' Motion for Summary Judgment be and the same hereby is granted, and that the Affidavit of William R. Hapner, Jr., dated March 6, 1972, and the said Stipulation be and the same hereby are stricken.

2. That the motion of the plaintiff, Aldon Keith Kentner, for rehearing of the Summary Final Judgment for Defendants be and the same hereby is denied.

DONE and ORDERED at Tampa, Florida, this 23 day of March, 1972.

/s/ JAMES D. BRUTON, JR.
Circuit Judge

Copies furnished to:

William R. Hapner, Jr., Esq.
F. Ronald Fraley, Esq.
William A. Gillen, Esq.

THE FEDERAL EMPLOYER'S LIABILITY ACT, 28 U.S.C. §§51-59.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any per-

son suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off

therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none,

then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only the recovery for the same injury.

AMENDED COMPLAINT

Now comes the plaintiff, ALDON KEITH KENTNER, and sues the defendants, SEABOARD COAST LINE RAILROAD COMPANY, and THE SEACOAST TRANSPORTATION COMPANY, foreign corporations, and alleges:

1. That the plaintiff, ALDON KEITH KENTNER, is a citizen and resident of Tampa, Hillsborough County, Florida, and defendants are foreign corporations with a principal place of business in Jacksonville and doing business in Hillsborough County, Florida.

2. That this is a civil action arising under Section 51-60, Title 45, U.S.C.

3. At all times material to this cause of action, the plaintiff, ALDON KEITH KENTNER, was an employee of the Seaboard Coast Line Railroad Company and its subsidiary, The Seacoast Transportation Company, doing business in Hillsborough County, Florida.

4. At all times material to this cause of action, the plaintiff was an employee of the defendant railroad and was working at his regular employment in furtherance of interstate commerce.

5. At on or about November 30, 1967, the plaintiff, ALDON KEITH KENTNER, pursuant to his employment by Seacoast Transportation Company, was called upon to assist in the loading of certain large rugs at the warehouse of W. J. Smalley on Westshore Boulevard, Tampa, Hillsborough County, Florida, which large rugs varied in weight from 200 to 800 pounds.

6. That on said date and at said place, the plaintiff, while attempting to unload said rugs, without assistance, was suddenly caused to fall and the rug was pushed against his right leg, causing him to be twisted and twisting his body around, causing him to fall in the trailer of the truck which he was loading.

This Indenture Witnesseth that, in consideration of the sum of TWENTY-FOUR THOUSAND NINE HUNDRED AND NO/100 ~~EIGHTY-FIVE THOUSAND~~ Dollars ($ ~~85,000.00~~ 24,000.00), receipt whereof is hereby acknowledged, for myself and for my heirs, personal representatives and assigns, I do hereby release and forever discharge ROYAL GLOBE INSURANCE COMPANY, SMALLEY TRANSPORTATION COMPANY and W. J. SMALLEY and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs representatives and assigns from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action, arising from any act or occurrence up to the present time and particularly on account of all personal injury, disability, property damage, loss or damages of any kind already sustained or that I may hereafter sustain in consequence of an accident that occurred on or about the 30th day of November 19 67, at ~~XXXX~~ warehouse occupied by W.J. Smalley, located on West Shore Blvd., Tampa, Florida.

To procure payment of the said sum, I hereby declare: that I am more than _____ years of age; that no representations about the nature and extent of said injuries, disabilities or damages made by any physician, attorney or agent of any party hereby released, nor any representations regarding the nature and extent of legal liability or financial responsibility of any of the parties hereby released, have induced me to make this settlement; that in determining said sum there has been taken into consideration not only the ascertained injuries, disabilities and damages but also the possibility that the injuries sustained may be permanent and progressive and recovery therefrom uncertain and indefinite, so that consequences not now anticipated may result from the said accident.

I hereby agree that, as a further consideration and inducement [illegible]

This Indenture Witnesseth that, in consideration of the sum of TWENTY-FOUR THOUSAND NINE THOUSAND TWO HUNDRED AND NO/100 DOLLARS ($24,000.00), receipt whereof is hereby acknowledged, for myself and for my heirs, personal representatives and assigns, I do hereby release and forever discharge ROYAL GLOBE INSURANCE COMPANY, SMALLEY TRANSPORTATION COMPANY and W. J. SMALLEY and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs representatives and assigns from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action, arising from any act or occurrence up to the present time and particularly on account of all personal injury, disability, property damage, loss or damages of any kind already sustained or that I may hereafter sustain in consequence of an accident that occurred on or about the 30th day of November 19 67, at warehouse occupied by W.J. Smalley, located on West Shore Blvd., Tampa, Florida.

To procure payment of the said sum, I hereby declare: that I am more than _____ years of age; that no representations about the nature and extent of said injuries, disabilities or damages made by any physician, attorney or agent of any party hereby released, nor any representations regarding the nature and extent of legal liability or financial responsibility of any of the parties hereby released, have induced me to make this settlement; that in determining said sum there has been taken into consideration not only the ascertained injuries, disabilities and damages but also the possibility that the injuries sustained may be permanent and progressive and recovery therefrom uncertain and indefinite, so that consequences not now anticipated may result from the said accident.

I hereby agree that, as a further consideration and inducement for this compromise settlement, this settlement shall apply to all unknown and unanticipated injuries and damages resulting from said accident, casualty or event, as well as to those now disclosed.

I understand that the parties hereby released admit no liability of any sort by reason of said accident and that said payment and settlement in compromise is made to terminate further controversy respecting all claims for damages that I have heretofore asserted or that I or my personal representative might hereafter assert because of the said accident.

Signed and sealed this 31st day of October, 19 70
(CAUTION-READ BEFORE SIGNING)

Witnessed by

Aldon Keith Kentner (SEAL)
Aldon Keith Kentner

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH } SS

On this 31st day of October 19 70 before me personally appeared ALDON KEITH KENTNER to me known to be the person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

My Commission expires _____
Notary Public, State of Florida at Large
My Commission Expires Jan. 23, 1971

7. The said fall and injury resulting therefrom as hereinafter described was caused by the negligence of the defendants in failing to provide the plaintiff with a safe place to work; in instructing the plaintiff to work in an unsafe place; in failing and neglecting to provide plaintiff with proper assistance with which to do his work, although it knew that the work that it had instructed plaintiff to perform required assistance; and in failing to safeguard plaintiff against injury in the performance of that work.

8. As a direct and proximate result of the aforesaid negligence of the defendants in whole or in part, the plaintiff, ALDON KEITH KENTNER, was painfully and permanently injured in and about his head, neck, body, limbs and nervous system; and he has suffered and will in the future suffer mental and physical pain and anguish, humiliation and embarrassment; he lost income from his job; he suffered a physical handicap and disability in connection with his usual activities and recreations, and will continue to suffer such handicap and disability in the future; and his ability to enjoy a normal life and his earning capacity have been permanently impaired. He has had to spend money for hospitalization, medicines and medical treatment because of the accident, and for travel necessary to secure such medical attention, and in the future will be compelled to incur similar expense for such medical care and travel to secure same.

WHEREFORE, the plaintiff, ALDON KEITH KENTNER, sues the defendants, SEABOARD COAST LINE RAILROAD COMPANY and THE SEACOAST TRANSPORTATION COMPANY, foreign corporations, and claims damages of and from the defendants in excess of $1,500.00, exclusive of costs, and requests a trial by jury.

WILLIAM R. HAPNER, JR.
Rood and Hapner
200 Pierce Street

Tampa, Florida 33602
ATTORNEYS FOR PLAINTIFF

ANSWER OF DEFENDANTS

The defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, jointly and severally, by their undersigned attorneys, for answer to the amended complaint of the plaintiff, Aldon Keith Kentner, say:

FIRST DEFENSE

For their first defense to the plaintiff's amended complaint, the defendants allege that the said amended complaint fails to state a cause of action against the defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

For their second defense to the plaintiff's amended complaint, the defendants say:

1. The defendants admit the allegations of paragraph 1 of the plaintiff's amended complaint.

2. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the plaintiff's amended complaint.

3. In answering paragraph 3 of the plaintiff's amended complaint, the defendants admit that, at all times material to this cause of action, the plaintiff, Aldon Keith Kentner, was an employee of the Seaboard Coast Line Railroad Company, doing business in Hillsborough County, Florida, but the defendants deny that the said plaintiff was an employee of The Seacoast Transportation Company.

4. Answering paragraph 4 of the plaintiff's amended complaint, the defendants admit that, at all times material to this cause of action, the plaintiff was an employee of the defendant railroad company, but the defendants deny each and all of the other allegations of the said paragraph.

5. The defendants deny the allegations of paragraph 5 of the plaintiff's amended complaint.

6. The defendants deny the allegations of paragraph 6 of the said complaint.

7. The defendants deny the allegations of paragraph 7 of the plaintiff's amended complaint.

8. The defendants deny the allegations of paragraph 8 of the plaintiff's amended complaint.

THIRD DEFENSE

For their Third Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. On or about November 30, 1967, while acting within the scope of his employment by the defendant, Seaboard Coast Line Railroad Company, the plaintiff drove a certain tractor-trailer to a warehouse occupied and operated by W. J. Smalley, doing business as Smalley Transportation Company, hereinafter referred to as "SMALLEY," on Westshore Boulevard, south of Buffalo Avenue, in Tampa, Florida, where the said trailer was to be loaded with certain rolled rugs or carpeting by the said SMALLEY, by his agents or employees.

3. The said SMALLEY, by his agents or employees, loaded one tier of rolled rugs or carpeting in the said trailer and was in the process of loading a second tier thereof into said trailer. At said time and place, and at the request of the said SMALLEY, by his agents or employees, the plaintiff voluntarily attempted to assist one or more agents or employees of the said SMALLEY in loading the said trailer. While so engaged, the plaintiff negligently was injured by the said SMALLEY, his agents or employees, as alleged in paragraph 4

and 5 of the complaint filed, July 15, 1969, in Suit No. 179833, in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, wherein the plaintiff herein, Aldon Keith Kentner, was plaintiff and Royal Globe Insurance Company and W. J. Smalley, doing business as Smalley Transportation Company, were defendants, a copy of which complaint is attached hereto marked Exhibit A and is made a part hereof by special reference as if set forth in haec verba, and such negligence of SMALLEY, his agents or employees, was a proximate cause of any injury suffered by the plaintiff.

4. The plaintiff was injured by the negligence of the said SMALLEY, his agents or employees, in the manner in which the said SMALLEY, his agents or employees, loaded or attempted to load the said rugs or carpeting from SMALLEY's warehouse into the said trailer.

5. The plaintiff herein was not injured as a result of the negligent failure of the defendants herein, or either of them, to furnish him a reasonably safe place in which to work.

6. The said SMALLEY and his agents or employees were not officers, agents or employees of the defendants herein, or either of them, and the alleged injury to the plaintiff did not result in whole or in part from the negligence of any of the officers, agents, or employees of either defendant herein, or by reason of any defect of insufficiency, due to the negligence of either defendant herein, in their respective cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

FOURTH DEFENSE

For their Fourth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of

paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 2 and 3 of their Third Defense to the plaintiff's amended complaint.

3. The plaintiff heretofore compromised and settled his aforesaid suit against Royal Globe Insurance Company and SMALLEY for the sum of Twenty-four Thousand Dollars ($24,000.00), and said sum was delivered to or on behalf of the plaintiff by or on behalf of the said SMALLEY in full satisfaction of plaintiff's claim in said Suite No. 179833.

4. The said SMALLEY and his agents or employees were not officers, agents or employees of either defendant herein.

5. Neither of the defendants owned, controlled or operated the premises where the alleged injury suffered by the plaintiff occurred or any equipment being used by the said SMALLEY, his agents or employees, at the time of such injury. Such premises and equipment were solely owned, controlled or operated by the said SMALLEY, his agents or employees, and the method of loading the said rugs or carpeting was solely selected and determined by the said SMALLEY, his agents or employees.

6. The aforesaid negligence of the said SMALLEY, his agents and employees, was primary or active.

7. If the aforementioned negligence of SMALLEY, his agents or employees, was imputed to the defendants herein, or either of them, by reason of the relationship of employer and employee between them, or either of them, and the plaintiff, then any liability of the defendants, or either of them, to the plaintiff was a result of vicarious, imputed, secondary or passive negligence, and the aforesaid accord and satisfaction of the plaintiff's claim against SMALLEY bars any recovery herein by the plaintiff against the defendants, or either of them.

FIFTH DEFENSE

For their Fifth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 2 and 3 of their Third Defense to the plaintiff's amended complaint.

3. The plaintiff heretofore compromised and settled his aforesaid suit against Royal Globe Insurance Company and SMALLEY for the sum of Twenty-four Thousand Dollars ($24,000.00), and heretofore, after plaintiff's claim in Suit No. 179833 accured, the plaintiff released SMALLEY from it.

4. The defendants adopt by reference and reallege as it set forth herein in haec verba the allegations of paragraphs 4, 5 and 6 of their Fourth Defense to the plaintiff's amended complaint.

5. If the aforementioned negligence of SMALLEY, his agents or employees, was imputed to the defendants herein, or either of them, by reason of the relationship of employer and employee between them, or either of them, and the plaintiff, then any liability of the defendants, or either of them, to the plaintiff was a result of vicarious, imputed, secondary or passive negligence, and the aforesaid release of the plaintiff's claim against SMALLEY bars any recovery herein by the plaintiff against the defendants, or either of them.

SIXTH DEFENSE

For their Sixth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 2 and 3 of their Third Defense to the plaintiff's amended complaint.

3. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 3 and 4 of their Fifth Defense to the plaintiff's amended complaint.

4. If the aforementioned negligence of SMALLEY, his agents or employees, was imputed to the defendants herein, or either of them, by reason of the relationship of employer and employee between them, or either of them, and the plaintiff, then any liability of the defendants, or either of them, to the plaintiff was a result of vicarious, imputed, secondary or passive negligence, and the defendants are entitled to have the court set off the aforementioned sum of Twenty-four Thousand Dollars ($24,000.00) heretofore paid by or on behalf of SMALLEY to or for the plaintiff from the amount of any judgment which the plaintiff may recover herein against the defendants, or either of them.

SEVENTH DEFENSE

For their Seventh Defense to the plaintiff's amended complaint, the defendants say that, at the time and place alleged in the plaintiff's amended complaint, the plaintiff's negligence contributed to the accident and his injury and damages because he negligently permitted a fork lift being used and operated by W. J. Smalley, doing business as Smalley Transportation Company, hereinafter referred to as "SMALLEY," by his agents or employees, to push a roll of rugs or carpeting against him while the plaintiff was engaged in loading or assisting in loading the said rugs or carpeting from SMALLEY's warehouse into the trailer of a tractor-trailer which the plaintiff was employed to operate for the defendant, Seaboard Coast Line Railroad Company.

FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY & BOGGS, P.A.
Post Office Box 1438
Tampa, Florida 33601
By: William A. Gillen
WILLIAM A. GILLEN
Attorneys for defendants

THIRD-PARTY COMPLAINT

The defendants-third-party plaintiffs, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, jointly and severally sue the third-party defendants, W. J. Smalley, doing business as Smalley Transportation Company, Smalley Investments, Inc., a corporation, and Royal Indemnity Company, a corporation, and allege:

First Cause of Action

1. The plaintiff, Aldon Keith Kentner, has filed against the defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, an amended complaint, a copy of which is hereto attached marked "Exhibit A", and which amended complaint is made a part hereof by special reference as if set forth herein in haec verba.

2. On or about November 30, 1967, while acting within the scope of his employment by the defendant-third-party plaintiff, Seaboard Coast Line Railroad Company, the plaintiff drove a certain tractor-trailer to a warehouse occupied and operated by the third-party defendants, W. J. Smalley, doing business as Smalley Transportation Company, hereinafter referred to as "SMALLEY," and/or Smalley Investments, Inc., on Westshore Boulevard, south of Buffalo Avenue, in Tampa, Florida, where the said trailer was to be loaded with certain rolled rugs or carpeting by the said SMALLEY and/or Smalley Investments, Inc., by their respective agents or employees.

3. Said SMALLEY and/or Smalley Investments, Inc., by their respective agents or employees, loaded one tier of rolled rugs or carpeting in the said trailer and was in the process of loading a second tier thereof into said trailer. At said time and place, at the request of the said SMALLEY and/or Smalley Investments, Inc., by their respective agents or employees, the plaintiff voluntarily attempted to assist one or more agents or

employees of the said SMALLEY and/or Smalley Investments, Inc. in loading the said trailer. While so engaged, the plaintiff negligently was injured by the said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees, as alleged in paragraphs 4 and 5 of the complaint filed, July 15, 1969, in Suit No. 179833, in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, wherein the plaintiff herein, Aldon Keith Kentner, was plaintiff, and Royal Globe Insurance Company and W. J. Smalley, doing business as Smalley Transportation Company, were defendants, a copy of which complaint is attached hereto marked "Exhibit B" and is made a part hereof by special reference as if set forth herein in haec verba, and such negligence of SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees was a proximate cause of any injury suffered by the plaintiff.

4. The plaintiff was injured by the negligence of the said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees, in the manner in which the said rugs or carpeting were loaded or attempted to be loaded from said warehouse into the said trailer.

5. Neither the said SMALLEY nor Smalley Investments, Inc., or their respective agents or employees were officers, agents or employees of either of the defendants-third-party plaintiffs herein.

6. Neither of the defendants-third-party plaintiffs, owned, controlled, or operated the premises where the alleged injuries suffered by the plaintiff occurred or any equipment being used by the said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees, at the time of such injury. Such premises and equipment were solely owned, controlled or operated by the said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees, and the method of loading the said rugs or carpeting was solely selected and determined by the

said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees.

7. The aforesaid negligence of SMALLEY and/or Smalley Investments, Inc., was primary or active.

8. If the aforementioned negligence of SMALLEY, his agents or employees, and/or Smalley Investments, Inc. was imputed to the defendants and third-party plaintiffs herein, or either of them, by reason of the relationship of employer and employee between them, or either of them, and the plaintiff, then any liability of the defendants and third-party plaintiffs, or either of them, to the plaintiff was a result of vicarious, imputed, secondary or passive negligence.

9. The defendants and third-party plaintiffs are informed and believed and therefore aver that the third-party defendant, Royal Indemnity Company, a corporation, was the insurer of the said SMALLEY and/or Smalley Investments, Inc. under a liability policy applicable to the event and injuries to the plaintiff hereinbefore described.

WHEREFORE, the third-party plaintiffs, jointly and severally, demand judgment against the third-party defendants, W. J. Smalley, doing business as Smalley Transportation Company, Smalley Investments, Inc., a corporation, and Royal Indemnity Company, a corporation, for all sums that may be adjudged against the defendants and third-party plaintiffs in favor of the plaintiff, Aldon Keith Kentner.

Second Cause of Action

1. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 1 through 9 of their First Cause of Action hereinbefore set forth.

2. After the plaintiff's claim and cause of action alleged in Suit No. 179833 against SMALLEY and Royal

Globe Insurance Company (in truth Royal Indemnity Company) had accrued, the plaintiff and SMALLEY and Royal Indemnity Company agreed upon a compromise and settlement of that suit for the sum of $24,000.00 to be paid to the plaintiff by SMALLEY and/or Royal Indemnity Company.

3. Out of the proceeds of the said sum of $24,000.00 agreed to be paid by SMALLEY and Royal Indemnity Company to the plaintiff, the defendant and third-party plaintiff, Seaboard Coast Line Railroad Company, was entitled to receive the sum of $12,455.81 representing sums advanced by it to or on behalf of the plaintiff for hospital, doctors', ambulance, medicines and other expenses in connection with the plaintiff's injuries. The plaintiff assigned and transferred to the defendant and third-party plaintiff, Seaboard Coast Line Railroad Company, his claim against W. J. Smalley, doing business as Smalley Transportation Company, to the extent of $12,455.81, less the sum of $3,835.65 (representing an attorneys' fee for the plaintiff's attorney of 30% of the said sum of $12,455.81 for negotiating settlement of and collecting the same, plus one-half of the plaintiff's court and other costs in the amount of $197.82 incurred in the suit against SMALLEY and his said insurer) leaving a balance of $8,620.16 due to be paid by SMALLEY and/or Royal Indemnity Company to Seaboard Coast Line Railroad Company.

4. The third-party plaintiffs are informed and believe and therefore aver that, out of the sum of $24,000.00 agreed to be paid to the plaintiff in settlement of the aforementioned Suit No. 179833, SMALLEY and Royal Indemnity have paid to the plaintiff the sum of $15,379.84, but have failed and refused to pay to Seaboard Coast Line Railroad Company or to the plaintiff, for the use and benefit of Seaboard Coast Line Railroad Company, the aforesaid sum of $8,620.16.

WHEREFORE, the third-party plaintiffs, demand judgment in favor of Seaboard Coast Line Railroad Company against the third-party defendants, W. J.

Smalley, doing business as Smalley Transportation Company, Smalley Investments, Inc., a corporation, and Royal Indemnity Company, a corporation, for the sum of $8,620.16, together with interest and court costs.

FOWLER, WHITE, GILLEN, HUMKEY, KINNEY & BOGGS, P.A.
Post Office Box 1438, Tampa, Florida 33601

By: William A. Gillen

Attorneys for Third-Party Plaintiffs

AMENDMENTS TO THIRD PARTY COMPLAINT

The defendants-third-party plaintiffs, Seaboard Coast Line Railroad Company, a corporation and The Seacoast Transportation Company, a corporation, jointly and severally, before a responsive pleading has been served to the third-party complaint heretofore filed herein by them, hereby amend the said third-party complaint in the following particulars and manner:

1. The defendants and third party complainants hereby amend the First Cause of Action contained in their third-party complaint by adding thereto a paragraph 10 in words and figures as follows:

> "10. The defendants and third-party plaintiffs were compelled to employ and did employ counsel, to wit, the law firm of Fowler, White, Gillen, Humkey, Kinney & Boggs, P.A., First Federal Building, Tampa, Florida, and to incur costs and expenses in defending the action filed against them by the plaintiff and in prosecuting this third-party complaint against the third-party defendants, and are entitled to recover from the third-party defendants the reasonable value of the services of the said attorneys so employed by them and to recover the court costs and expenses incurred herein by them."

2. The defendants and third-party plaintiffs hereby amend the demand for judgment for relief contained in said First Cause of Action of their third-party complaint to read as follows:

> "WHEREFORE, the third-party plaintiffs, jointly and severally, demand judgment against the third-party defendants (1) for all sums that may be adjudged against the defendants and third-party plaintiffs in favor of the plaintiff, Aldon Keith Kentner, (2) for the reasonable value of the services rendered by the attorneys employed by the defendants and third-party plaintiffs herein, and (3) for their costs incurred herein."

3. The defendants and third-party plaintiffs hereby amend the Second Cause of Action contained in their third party complaint in the following respects:

> A. By deleting the paragraph at the end of the first sentence in paragraph 3 thereof, by substituting a comma in place of said period and by adding the following words at the end of said sentence: "pursuant to the provisions of a written assignment executed by the plaintiff, a copy of which is attached hereto marked "Exhibit C."
>
> B. By adding at the end of paragraph 3 thereof a new sentence in words and figures as follows: "The last mentioned assignment and transfer was oral, but an oral notice thereof was furnished by William R. Hapner, Jr., Esq., as counsel for the plaintiff, to F. Ronald Fraley, Esq., as counsel for SMALLEY and Royal Indemnity Company, on or about 1/25/71, and was confirmed by a letter, dated January 25, 1971, a copy of which is hereto attached marked "Exhibit D."

4. The defendants and third-party plaintiffs hereby amend their third-party complaint by adding thereto a Third Cause of Action in words and figures as follows:

"Third Cause of Action

1. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 1 through 7 of their First Cause of Action, as amended.

2. If the defendants and third-party plaintiffs were guilty of negligence which was a proximate cause of damage to the plaintiff, as alleged in the plaintiff's amended complaint, a copy of which is attached hereto marked "Exhibit A", such negligence on their part was secondary or passive negligence, and, if the defendants are held liable to the plaintiff for such negligence, then the defendants and third-party plaintiffs are entitled to indemnity from SMALLEY and/or Smalley Investments, Inc., for such liability, because the said SMALLEY and/or Smalley Investments, Inc., were guilty of primary or active negligence which was a proximate cause of the plaintiff's said damages.

3. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 9 and 10 of their First Cause of Action, as amended.

WHEREFORE, the third-party plaintiffs, jointly and severally, demand judgment against the third-party defendants (1) for all sums that may be adjudged against the defendants and third-party plaintiffs in favor of the plaintiff, Aldon Keith Kentner, (2) for the reasonable value of the services rendered by the attorneys employed by the defendants and third-party plaintiffs herein, and (3) for their costs incurred herein."

5. The defendants and third-party plaintiffs hereby amend their third-party complaint by adding thereto a Fourth Cause of Action in words and figures as follows:

"Fourth Cause of Action

1. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 1 through 7 of their First Cause of Action, as amended.

2. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 2, 3 and 4 of their Second Cause of Action, as amended.

WHEREFORE, the third-party plaintiffs demand judgment against the third-party defendants for the sum of $8,620.16, together with interest and court costs."

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Post Office Box 1438, Tampa Florida 33601

By: William A. Gillen

Attorneys for Defendants and Third-Party Defendants

AMENDMENTS TO ANSWER OF DEFENDANTS

The defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, jointly and severally, by their undersigned attorneys, hereby amend the Answer of Defendants as follows:

1. The defendants hereby add to their answer an Eighth Defense in words and figures as follows:

"EIGHTH DEFENSE

For their Eighth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the alle-

gations of paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 2, 3 and 4 of their Third Defense to the plaintiff's amended complaint.

3. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 3, 4, 5 and 6 of the Fourth Defense to the plaintiff's amended complaint.

4. If the defendants were guilty of any alleged negligence which was a proximate cause of damage to the plaintiff, such negligence on the part of the defendants was secondary and passive negligence, and the aforesaid accord and satisfaction of the plaintiff's claim against SMALLEY, who was guilty of primary or active negligence, bars any recovery herein by the plaintiff against the defendants, or either of them."

2. The defendants hereby amend the answer of defendants by adding thereto a Ninth Defense in words and figures as follows:

"NINTH DEFENSE

For their Ninth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1, 2, 3 and 4 of their Fifth Defense to the plaintiff's amended complaint.

2. If the defendants were guilty of any alleged negligence which was a proximate cause of any damage to the plaintiff, such negligence was secondary or passive negligence, and the aforesaid release by the plaintiff of his claim against

SMALLEY bars any recovery herein by the plaintiff against the defendants, or either of them.

3. The defendants hereby amend their answer by adding thereto a Tenth Defense in words and figures as follows:

"TENTH DEFENSE

For their Tenth Defense to the plaintiff's amended complaint the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1, 2, 3 and 4 of their Fifth Defense to the plaintiff's amended complaint.

2. If the defendants were guilty of any alleged negligence which was a proximate cause of any damage to the plaintiff, such negligence was secondary or passive negligence, and the defendants are entitled to have the court set off the aforementioned sum of $24,000.00 heretofore paid by or on behalf of SMALLEY to or for the plaintiff from the amount of any judgment which the plaintiff may recover herein against the defendants, or either of them.

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Post Office Box 1438, Tampa, Florida 33601

By: William A. Gillen

Attorneys for Defendants

MOTION FOR REHEARING

Now comes the plaintiff and moves the Court for a rehearing of its Summary Judgment against plaintiff entered herein pursuant to Rule 1.530(a) of the Florida Rules of Civil Procedure, and as grounds therefore, says,

1. The Court erred in failing to consider the intention of the parties to the release plead by defendant

as required by the United States Supreme Court decision in *Zenith Radio Corporation v. Hazeltine Research,* 41 US 321, 91 Supreme Court 795 (1971) and followed by [sic] the Fifth Circuit Court of Appeals in *Cates v. United States,* 451 Fed 2d 411, (1972). Evidence of the fact that the parties to the release did not intend to release the Railroad is submitted by the affidavit of counsel for plaintiff attached hereto, and the stipulation of counsel for the parties to the release in regard to their statements at the previous hearing for the Motion for Summary Judgment herein also attached hereto.

2. The Court erred in applying Federal Law to the issues raised by defendant in regard to the release when the said release was executed and delivered in accordance with Florida Law and specifically Florida Statute Section 768.041.

WILLIAM R. HAPNER, JR.
Rood and Hapner
200 Pierce Street
Tampa, Florida 33602

ATTORNEYS FOR PLAINTIFF

A F F I D A V I T

WILLIAM R. HAPNER, JR., being first duly sworn, deposes and says that he was counsel for plaintiff herein in the former case of *Kentner v. Smalley, et al,* No. 179833, on the docket of this Court and that when the release plead by the defendant in the within cause was executed by his client, it was his intention as well as that of his client as previously stated to counsel for defendant, W. J. SMALLEY, to file the within cause of action against the Railroad defendant and that it was considered by counsel for plaintiff that the Florida Statutes clearly provided that the execution of the release would not release any claim against the railroad defendant and said advice was given to the plaintiff, herein, at that time.

Further Affiant saeth not.

/s/ WILLIAM R. HAPNER, JR.

STIPULATION CONCERNING STATEMENTS MADE DURING HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

It is hereby stipulated and agreed between the Plaintiff, through his undersigned attorney and the Third Party Defendants, W. J. Smalley, d/b/a Smalley Transportation Company and Royal Globe Insurance Company, through their undersigned attorneys, that during the hearing on the Motion for Summary Judgment, filed in this cause by the Defendant/Third Party Plaintiff, Seaboard Coast Line Railroad Company, the attorney for the Plaintiff stated to the Trial Judge that it was not the intention of the Plaintiff to release his claim against the Railroad when the Release in issue was executed. Then, when the undersigned attorney for Smalley and Royal Globe was asked about his intention in obtaining the Release, the undersigned attorney stated that it was his intention to obtain a full Release in favor of his clients and he not know who all would be released through Mr. Kentner's execution of the Release in issue.

/s/ W. R. Hapner, Jr.
Attorney for Plaintiff, Aldon Keith Kentner

/s/
Attorney for W. J. Smalley, d/b/a
Smalley Transportation Company,
Smalley Investments, Inc., Royal
Indemnity Company and Royal
Globe Insurance Company

DEFENDANTS' MOTION TO STRIKE AFFIDAVIT AND STIPULATION CONCERNING STATEMENTS MADE DURING HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, by their undersigned attorneys hereby move to strike the Affidavit of William R. Hapner, Jr., dated March 6, 1972, and the Stipulation Concerning Statements Made During Hearing on Defendants' Motion for Summary Judgment referred to in the plaintiff's Motion for Rehearing, served herein, upon the following grounds:

1. Neither the said Affidavit nor the said Stipulation are admissible to vary or to attempt to vary the terms and provisions of the written Release of All Claims, dated October 30, 1970, executed and delivered by the plaintiff, Aldon Keith Kentner.

2. Any and all prior negotiations and agreements between the plaintiff, Aldon Keith Kentner, and the defendants, in Suit No. 179833, filed in this court were merged in the final Release of All Claims dated October 30, 1970, executed and delivered by the plaintiff.

3. The terms and provisions of the said Release may not be varied by subsequent parol or written testimony.

4. Neither the said Affidavit nor the Stipulation are admissible in this action for any purpose.

5. The said Affidavit and Stipulation are untimely, and should not be considered by the court after the entry herein of its Final Summary Judgment, dated February 28, 1972.

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Post Office Box 1438, Tampa, Florida 33601

By: William A. Gillen
William A. Gillen
Attorneys for Defendants